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IN THE

Supreme Court of the United States

October Term, 1996

WELLS FARGO BANK, N.A.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C. with supporters nationwide. WLF believes it is in the public interest to hold the federal government and its agencies accountable for their conduct, including their contractual dealings with the private sector.

WLF has appeared as amicus in numerous cases before this Court, including those that raise the issue of the extent of the government's authority to hold officers of financial institutions liable for their conduct, as well as the scope of the Takings Clause of the Fifth Amendment. *See, e.g., Atherton v. FDIC,* 65 U.S.L.W. 4062 (U.S. Jan. 14, 1997)(No. 95-928); *Dolan v. City of Tigard,* 114 S.Ct. 2309 (1994). In addition, WLF has litigated cases in the lower federal courts that raise the issue of sovereign immunity and separation of powers regarding government liability and the scope of sanctions for misconduct. *See, e.g., In re David A. Kessler,* 100 F.3d 1015 (D.C. Cir. 1996); *Washington Legal Found. v. United States Sentencing Comm'n,* 89 F.3d 897 (D.C. Cir. 1996); *United States v. Waksberg,* No. 95-5165 (D.C. Cir.)(appeal docketed June 13, 1995).

WLF takes issue with the Government's position that a party whose contract with the United States is breached by the United States may not recover foreseeable and direct damages. The Government's view of its contractual obligations would permit the United States to receive the benefits of its bargains without having to pay for the consequences of its breach, thereby holding the United States to a lesser standard of accountability than private parties. In particular, WLF is troubled by the Government's apparent inability (or unwillingness) to recognize that in the banking context, by virtue of the Government's own regulations, diminished capital reserves and lost profits are the foreseeable and direct results of its failure to fulfill a promise to issue a

guarantee. This position is contrary to law and will likely affect the future willingness of private businesses to share in the burden of promoting socially desirable but financially risky ventures. WLF believes it is in the public interest for the Court to recognize the significance of this issue to the broad business community as well as to society at large.[1]

STATEMENT OF THE CASE

The essence of this case is whether the United States may enter into and accept the benefits of contracts with private parties and avoid liability for certain foreseeable and direct damages in the event it breaches a contract. While the contract at issue in this case concerns the Government's failure to fulfill its obligations to enter into a loan guarantee and the resultant damages caused to the bank when it was unable to engage in its primary business of making loans, the principle is the same for all industries. Namely, whether the Government is liable for foreseeable and direct damages as is any private party to a contract when neither statute, regulation nor the terms of the contract otherwise limit damages.

The United States Court of Appeals for the Federal Circuit in *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012 (Fed. Cir. 1996), *without overturning the trial court's findings of fact*, affirmed the Government's breach of its obligation to issue a contract to guarantee repayment of Petitioner's loan, but reversed a major portion of the damages awarded by the Court of Federal Claims. In particular, the Federal Circuit disallowed the recovery of profits the bank claimed it lost as a result of its diminished lending capacity.

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[1] Petitioner and the United States have consented to the filing of this brief. Their respective letters of consent are filed herewith.

In misguided reliance upon a line of cases beginning with *Northern Helex Co. v. United States*, 524 F.2d 707 (Ct. Cl. 1975), the Federal Circuit departed from widely accepted common law principles regarding the calculation of damages and held that Petitioner's lost profits damages were "too remote and uncertain" to be included in Petitioner's damage award. *Wells Fargo*, 88 F.3d at 1024.

According to the Federal Circuit, Petitioner's lost profits were not a foreseeable result of the Government's breach because "the purpose of the guarantee was to enable Wells Fargo to make profits from interest on its loan to High Plains, not on some other loans it might make." *Id.* at 1023. Both the Federal Circuit's logic and the cases on which it relied in reaching this conclusion stand in stark contrast to the volumes of cases, beginning with *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854), that define what and how damages are calculated. These cases (and the common law damages principles they apply) show that the damages claimed by Wells Fargo are neither remote nor uncertain. To the contrary, when the Government refused to guarantee the Petitioner's loan, it reduced the bank's lending capital (and, consequently, its profits). The Government was in a unique position to understand the interdependent relationship between capital, the bank's ability to lend money, and the bank's ability to generate profits by virtue of its own regulatory authority over banks like the Petitioner.

Simply put, the issue before this Court is whether a party whose contract is breached by the United States may recover foreseeable and direct damages from the United States, including lost or anticipated profits, just as it would be entitled to recover from a private party; or whether, as the Federal Circuit has held, different standards are used to calculate damages when contracting with the Government

even in the absence of a limiting statute, regulation or contract clause.[2]

SUMMARY OF ARGUMENT

If left to stand, the Federal Circuit's holding leaves the United States able to enter and administer contracts like a private party. Yet, when it breaches those contracts it is given special rights created by the Federal Circuit.[3] This

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[2] The Federal Circuit is the only federal court of appeals with jurisdiction to consider the Government contracts issue in this case. *See* 28 U.S.C. § 1295 (1994). As a result, no inter-circuit conflict can exist here. Thus, the absence of such conflict should not be a grounds for denying Wells Fargo's Petition. The Federal Circuit should not interpret its exclusive jurisdiction as a license to ignore the well-established body of law (from other federal courts) permitting recovery of foreseeable consequential damages in similar contexts. As this brief demonstrates, moreover, the Federal Circuit's approach in this case conflicts with its own analysis of damages against the United States in analogous contexts. The resulting confusion is sufficient to justify Supreme Court review.

[3] Petitioner is aware of the pending petition for a writ of certiorari in *Krygoski Constr. Co. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Feb. 5, 1997)(No. 96-___). Both the WLC's petition and the *Krygoski* petition allege that the Federal Circuit has failed to apply precedent properly, including prior decisions of this Court, in actions seeking breach of contract damages. The two cases, however, have critical factual differences. In particular, the contract at issue in *Krygoski* is goverened by federal procurement regulations which may, in certain circumstances, operate to limit the amount of damages a party can recover for the government's breach of contract. Granting a writ of certiorari in either case will not resolve the issues in the other.

differential treatment is likely to discourage private parties from continuing to contract with the United States.

The Federal Circuit improperly limited Petitioner's ability to recover the full range of damages available under the common law. Neither sovereign immunity nor any other recognized doctrine applies in this case to exclude foreseeable and direct damages, including lost profits, from Petitioner's damages award. The Federal Circuit's decision does not comport with its own prior decisions (or the decisions of other federal courts) recognizing lost profits as an appropriate measure of damages in analogous contexts. The Federal Circuit's unauthorized attempt to limit the United States' contractual liability should not be permitted to stand without further review.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION WILL DISCOURAGE PRIVATE PARTIES FROM CONTRACTING WITH THE GOVERNMENT

This Court should review the Federal Circuit's ruling in *Wells Fargo* because that ruling, which allows the United States to avoid liability for foreseeable and direct damages, will adversely affect the willingness of private parties to continue to contract with the United States and, consequently, the ability of the United States to contract freely in the private sector. The gravamen of the Federal Circuit's decision is that the Government, unlike private parties, cannot be held liable for foreseeable and direct damages (including lost profits). Although *Wells Fargo* arises in the context of the Government's breach of a contractual commitment to guarantee repayment of ethanol-related construction loans, the implications of the Federal Circuit's ruling potentially affect thousands of firms that do business with the Government.

Businesses have long agreed to enter into contracts with the Federal Government secure in the knowledge that their rights under a contract with the Government would not differ materially from their rights under contracts with private parties. It is well-established that when the Government enters into contracts with private parties, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Winstar Corp. v. United States*, 64 F.3d 1531, 1551 (Fed. Cir. 1995)(quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)), *aff'd*, 116 S.Ct. 2432 (1996).

Private businesses view lost profits, as an important component of an adequate damages remedy. As the Federal Circuit correctly noted in *Wells Fargo*, "'[t]he general rule in common law breach of contract cases is to award damages that will place the injured party in as good a position as he or she would have been in had the breaching party fully performed.'" 88 F.3d at 1021 (quoting *Estate of Berg v. United States*, 687 F.2d 377, 379 (Ct. Cl. 1982)). Loss of anticipated profits "is a recognized measure of damages, where their loss is the proximate result of the breach and the fact that there would have been a profit is definitely established, and there is some basis on which a reasonable estimate of the amount of the profit can be made." *Neely v. United States*, 285 F.2d 438, 443 (Ct. Cl. 1961).

The Federal Circuit, however, has decided that these rules no longer apply to the United States to the extent that they provide for recovery of foreseeable and direct damages. This anomalous decision likely will affect the willingness of private parties to continue to contract with the United States. Aside from the obvious detriment to the government of being unable to contract freely with private parties, the prospect of recovering less than the amount of damages required to make

the non-breaching party whole also is likely to have a chilling effect on the willingness of private businesses to share in the burden of promoting socially desirable but financially risky ventures. Given the significance of these consequences, both to the government and to the broad business community, the Federal Circuit's decision should not escape this Court's review.

II. THE FEDERAL CIRCUIT IMPROPERLY LIMITED THE GOVERNMENT'S CONTRACTUAL LIABILITY IN THIS CASE

The Federal Circuit improperly departed from common law contract recovery principles when it excluded lost profits from Petitioner's damage award. In the absence of a limiting statute, regulation or contract clause, parties who contract with the United States are entitled to recover compensatory damages, including lost profits, in the event the United States breaches the contract. No principle of sovereign immunity limits the United States' liability in this case because the Government has waived such immunity for contract actions. Nor could the Federal Circuit rely upon any other recognized doctrine to limit Petitioner's recovery, such as the contractual limitation routinely applied in Federal procurement contracts to limit breach of contract damages to a claim for incurred costs and to prohibit recovery of anticipated profits.

A. Under the Common Law, Petitioner Is Entitled to Recover Its Lost Profits

An examination of analogous precedent reveals that according to common law contract recovery principles, Petitioner was entitled to recover the profits it lost as a result of the Government's failure to fulfill its promise to guarantee Petitioner's ethanol plant construction loan. In the insurance context, for example, numerous courts have found that where

an insurance company breaches its contract with an insured by wrongfully refusing to pay on a policy, the insured may recover consequential damages (including lost profits) arising directly from the breach. *E.g., Royal College Shop, Inc. v. Northern Ins. Co. of New York*, 895 F.2d 670, 678 (10th Cir. 1990)(trial court properly permitted jury to award damages to insured for loss of business arising from insurer's failure to pay on insurance policy); *Salamey v. Aetna Casualty & Surety Co.*, 741 F.2d 874, 877 (6th Cir. 1984)(insured could recover lost profits from store as consequential damages for breach of insurance contract).[4] The insurance analogy is particularly appropriate in this case in light of the Court of Federal Claims' finding, which the Federal Circuit did not dispute, that a loan guarantee "is essentially an insurance policy." *Wells Fargo*, 33 Fed. Cl. 233, 245 (1995).

The court in *Royal College* explained its decision to permit recovery of consequential damages as follows:

> It is elementary that a business obtains insurance against fire loss and to restore itself to the status quo, i.e., the status before the fire. If a fire should occur, and the insurance company should refuse to pay under the policy, a business could be forced to close down for lack of finances.

895 F.2d at 679. In other words, if the insurer had honored its contract, the insured would have been limited to the

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[4] *See also Lawton v. Great Southwest Fire Ins. Co.*, 118 N.H. 607, 610 (1978)("The subject insurance contract limits the insurer's liability to $250,000 for damages that result from the casualties insured against, not its liability for damages resulting from its own breach of contract.")

damages provided for in the contract, or the cost of repairing the fire damage. The insurer's failure to keep up its end of the bargain, however, permitted the insured to recover for the consequential damages of that breach: the loss of its business due to inadequate finances.

This analysis applies with equal force in this case. Had the Government honored its promise to guarantee Petitioner's loan, Petitioner would have been limited to the damages provided for in the agreement, or the difference between its losses under the contract and the amount guaranteed by the Government (plus any interest due under the terms of the agreement), in the event of the government's subsequent breach. By completely failing to satisfy its contractual obligation, however, the United States failed to protect Petitioner's capital and opened itself up to liability for the natural, foreseeable consequences of that action: the loss of capital and the loss of profits earned on capital. This analogous precedent makes clear that under common law recovery principles, Petitioner was entitled to recover lost profits caused by the Government's failure to honor the terms of the parties' agreement.

B. The Federal Circuit Misapplied Precedent in Limiting Petitioner's Damages

The cases on which the Federal Circuit relied in limiting Petitioner's recovery do not support the creation of a separate contractual liability rule for the United States. The Federal Circuit principally relied upon *Northern Helex Co. v. United States*, 524 F.2d 707 (Ct. Cl. 1975), in suggesting that common law damage principles permitting recovery of lost or anticipated profits do not apply to the United States. In particular, the Federal Circuit relied upon the following language: "remote and consequential damages are not recoverable in a common-law suit for breach of

contract. . . . especially . . . in suits against the United States for the recovery of common-law damages, such as the instant case." *Wells Fargo, 88 F.3d at 1021 (quoting Northern Helex*, 524 F.2d at 720). The Federal Circuit apparently focused on the word "especially" in this statement, as somehow suggesting that different contractual liability rules apply to the United States than to private parties. In fact, earlier in the opinion the *Northern Helex* court reaffirmed that "[t]he Government cannot be excused for its breach of the contract. The plaintiff is entitled to recover common-law damages for such breach." 524 F.2d at 720. Thus, nothing in *Northern Helex* can be construed as disturbing the principle that a party may recover common law damages from the United States for breach of contract.

The Federal Circuit also relied on *Northern Helex* in finding that Petitioner's lost profits damages are "too remote, speculative an[d] consequential to be compensable as damages." *Wells Fargo*, 88 F.3d at 1023 (quoting *Northern Helex*, 524 F.2d at 720-21). By looking only at one isolated statement in *Northern Helex*, but not at what actually happened, the Federal Circuit again misses the mark. In *Northern Helex*, the plaintiff contractor sought to recover damages from the government for defaulting on a contract to purchase helium. *Northern Helex* 524 F.2d at 709. The court denied one portion of the contractor's damage claim, finding that

> plaintiff's claim for the costs of the operation of its plant to the end of the contract term in connection with its non-federal work with its related companies was too remote, speculative and consequential to be compensable as damages.

Id. However, *in the very next sentence,* the court stated: "Of course, the plaintiff is entitled to recover its pecuniary loss of

anticipated and unearned profits." *Id.* at 721. The court in *Northern Helex* actually held that the plaintiff could recover those profits it would have earned had the government fulfilled its contract. So too, in this case, Petitioner was entitled to recover those profits it would have earned had the government fulfilled its contract.

That the plaintiff in *Northern Helex* was a helium manufacturer and Petitioner is a bank does not alter its value as directly analogous precedent. The plaintiff in *Northern Helex* was engaged in the business of producing and selling helium. In this case, Petitioner is engaged in the business of loaning money (based on its capital reserves) in order to generate profits. Just as it was foreseeable in *Northern Helex* that the government's default would cause the plaintiff to lose the profits it otherwise would have earned from the sale of helium, it was equally foreseeable in this case that the Government's failure to provide the agreed upon loan guarantee would cause Petitioner to lose capital and lose the profits it otherwise would have made by making loans based on that capital.[5] Contrary to the Federal Circuit's argument in *Wells Fargo*, *Northern Helex* supports Petitioner's claim for lost profits damages in this case.

The remaining authority relied upon by the Federal Circuit similarly fails to support its decision to exclude lost profits from Petitioner's damage award. In *William Green*

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[5] Any suggestion that the Government could not have foreseen the consequences of its breach is incongruous. After the Government refused to provide the loan guarantee, the Government's own regulators forced Petitioner to reallocate its capital to reflect the doubtful collectibility of the loan, thereby resulting in a reduction of its capital lending base. *See Wells Fargo*, 33 Fed. Cl. at 239.

Constr. Co., Inc. v. United States, 477 F.2d 930, 936 (Ct. Cl. 1973), for example, the court rejected plaintiff's claim for anticipated profits because the parties had agreed, by an express contract term, to limit recovery to an equitable adjustment (which includes actual costs incurred but not lost profits).

In rejecting the plaintiff's claim for consequential damages in *Ramsey v. United States*, 121 Ct. Cl. 426, 434 (1951), the Court of Claims expressly noted that the plaintiff's claim was "not for the anticipated profits of the contracts in question, but . . . for the anticipated profits of its entire business enterprise." This analysis simply does not apply here. In this case, Petitioner only sought lost profits from the capital that was no longer available for lending because of the Government's breach. As a result of its actions, the Government exposed itself to damages flowing not from the parties' contract, but from the foreseeable and direct consequences of the Government's failure to fulfill its obligations under that contract: Petitioner's loss of capital and loss of income.

In short, the cases relied on by the Federal Circuit in denying Petitioner's claim for lost profits damages are easily distinguishable on their facts and, in any event, do not support the Federal Circuit's finding that a party may never recover foreseeable and direct damages from the United States. As such, the court's decision in *Wells Fargo* should not be permitted to stand unreviewed.

C. The Federal Circuit Had No Basis for Limiting Petitioner's Common Law Damages

While the operation of a statute, regulation or contract clause may limit a plaintiff's ability to recover the full amount of contract damages available under the common law, no

such limitation exists in this case. First and foremost, the Government's contractual liability in this case is not subject to any sovereign immunity limitation. The Federal Circuit's decision in *Wells Fargo* is inconsistent with its decisions in other cases in which the United States has waived sovereign immunity.

1. *A Party May Recover Common Law Contract Damages Against the United States Where Sovereign Immunity Has Been Waived*

The Federal Circuit could not rely on sovereign immunity principles to limit Petitioner's ability to recover common law damages because the Government waived sovereign immunity in this case. The Tucker Act provides in relevant part that the Court of Federal Claims "shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution . . . or upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a)(1). The Tucker Act is a jurisdictional statute, which does not itself create any substantive right against the United States for money damages. *United States v. Testan*, 424 U.S. 392, 398 (1976).

When it consented to enter into a contract with the Petitioner, however, the United States also implicitly gave its consent to be sued in the event of a contract dispute. *See Brown v. United States*, 86 F.3d 1554, 1559 (Fed. Cir. 1996). The Federal Circuit therefore could not limit Petitioner's contract damages through the application of sovereign immunity. Rather, it created a "shadow sovereign immunity" in an attempt to limit the United States' liability for contract damages. Such an anomalous decision should not escape this Court's review.

2. *The Federal Circuit Recognizes Lost Profits as an Appropriate Measure of Damages In Other Cases in Which the United States Has Waived Sovereign Immunity*

The Federal Circuit's decision to limit the United States' liability for consequential damages in the context of contract actions is inconsistent with its treatment of the same issue in analogous contexts in which the government has waived sovereign immunity, including patent infringement cases and in the context of a non-patent related Fifth Amendment Takings claim. Since the Federal Circuit has not articulated any rationale for making this distinction, the Court's review is all the more important.

The government's unlicensed use of a patented invention is viewed as a taking of property under the Fifth Amendment through the government's exercise of its power of eminent domain. *Hughes Aircraft Co. v. United States*, 86 F.3d 1566, 1571 (Fed. Cir. 1996). Pursuant to 28 U.S.C. § 1498(a), private parties may seek restitution against the government in the Court of Federal Claims for patent infringement. Under § 1498(a), a patent owner is entitled to its "reasonable and entire compensation for such use and manufacture." *Id.*

Where an established royalty rate for the patent holder's invention exists, that rate generally is adopted as the best measure of reasonable and entire compensation. *Id.* at 1572; *see also Tektronix, Inc. v. United States*, 552 F.2d 343, 347 (Ct. Cl. 1977). Where no such royalty is shown, however, alternative methods, such as an assessment of lost profits, may be used to measure the patent holder's just compensation. *Tektronix*, 552 F.2d at 347; *accord Leesona Corp. v. United States*, 599 F.2d 958, 970-71 (Ct. Cl. 1979).

The Federal Circuit's rationale for excluding lost profits from damage awards when the government breaches a contract, but recognizing lost profits as a proper measure of just compensation when the government appropriates a patented invention, is not readily discernible.

The Federal Circuit's decision to limit recovery of lost or anticipated profits in this case also conflicts with its prior decisions (as well as decisions of this Court) permitting the recovery of compensatory damages, including lost profits, in the context of non-patent related Fifth Amendment Takings claims. As set forth more fully below, a strict application of the Federal Circuit's decision in *Wells Fargo* could actually result in a disparity between the amount of damages available to plaintiffs under the Takings clause and the amount of damages available to plaintiffs in a traditional contract action.

The Just Compensation Clause of the Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); U.S. Const. amend. V. When the government enters into a contract with a private party, the values exchanged amount to property interests that are "entitled to protection under the Takings Clause of the Fifth Amendment." *Yankee Atomic Elec. Co. v. United States*, 33 Fed. Cl. 580, 586 (1995)(quoting *Lynch*, 292 U.S. at 578). This Court specifically has recognized that a compensable taking occurs when the government appropriates a contract. *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1924).

In awarding compensation for a Fifth Amendment taking, this Court has sought to put the claimant "in as good a position pecuniarily as if his property had never been taken." *Olson v. United States*, 292 U.S. 246, 255 (1934). Where

tangible property is taken, this value is often set at the fair market value of the property at the time of the taking. *United States v. Miller*, 317 U.S. 369, 374 (1943). Under this standard, the owner of the property receives what a "willing buyer would pay in cash to a willing seller." *Id.* There is no set formula for establishing what amount of compensation is just. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949). Principles of equity must inform the determination. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

Where the government has appropriated an entire contract, just compensation has been fixed at the amount a willing buyer would have paid to a willing seller for an assignment of contract rights. *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61, 72 (1931); *Brooks-Scanlon*, 265 U.S. at 123-24. One of the key factors to be considered in fixing this amount is the anticipated profitability of the contract if fully performed. *De Laval*, 284 U.S. at 72. Thus, recovery in the takings context includes not only the acquisition costs of the property to the owner, but also its appreciated value, which is the fair market value that the owner would have realized had the property been sold before the taking, including the discounted value of any future income. *See id.*

The Federal Circuit previously applied these principles in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1178 (Fed. Cir. 1991), in which the court upheld an award under the Takings clause equal to the fair market value of the plaintiff's appropriated asset over the life of the asset, including reasonable profits, discounted to a present value. In *Whitney Benefits*, the government's enactment of the Surface Mining Control and Reclamation Act prohibited surface mining of the plaintiff's coal, thereby depriving the plaintiff of "'all economically viable use' of its property and destroying

its value." *Id.* at 1172. The court found that a government taking occurred because "economic development [was] effectually prevented." *Id.* (internal citation omitted).

The Federal Circuit's decision to award lost profits to the plaintiffs in *Whitney Benefits* for a government taking stands in stark contrast to its decision to preclude the Petitioner from recovering lost profits in *Wells Fargo* for the Government's breach of contract. The cases are not materially distinguishable from a factual perspective. Just as the government's action in *Whitney Benefits* prevented the plaintiffs from developing the resource at issue in that case (coal), the Government's action in this case prevented Petitioner from developing the resource at issue here (capital). Moreover, the purpose behind both recovery principles is the same: to put the claimant in as good a position financially as if the breach had not occurred, or its property was not taken. *See Estate of Berg*, 687 F.2d at 379 (breach of contract rule); *Olson*, 292 U.S. at 255 (takings rule). The Federal Circuit has not identified any support for its unilateral decision to limit the amount of damages available under one theory and not the other, nor does any such support exist.

The Federal Circuit's central holding in *Wells Fargo* -- that lost or anticipated profits are not recoverable against the Government under a breach of contract theory -- thus effectively imposes a limit on the amount of breach of contract damages available to future plaintiffs, but not on the amount of damages available to plaintiffs under the Takings clause. A strict application of *Wells Fargo* would actually encourage plaintiffs harmed by the Government's breach of contract to seek recovery under the Takings clause as opposed to general contract principles. This unseemly result cuts against this Court's commonly articulated preference for resolving contractual claims before reaching constitutional

claims. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). More to the point, this result constitutes an illogical and impermissible limitation on the right to recover breach of contract damages.

3. *No Other Limitation on Petitioner's Right to Recover Lost Profits Exists in This Case*

Where the United States has waived sovereign immunity, statutes and regulations may still provide a basis for limiting the government's liability. In most government contracts, for example, applicable procurement statutes and regulations require the inclusion of a Termination For Convenience Clause (*e.g.*, FAR § 52.249-2), Changes Clause (*e.g.*, FAR § 52.243-1), or other clause that generally limits a contractor's recovery to an equitable adjustment rather than traditional breach of contract damages. *See G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 423 (1963); *General Eng'g & Mach. Works v. O'Keefe*, 991 F.2d. 775, 779-80 (Fed. Cir. 1993). In these cases, the government in effect has a statutory right to cancel the parties' contract. This right of cancellation limits the contractor's right to require performance under the contract and, as a result, the amount and character of the loss for which the government may be held responsible. *See College Point Boat Corp. v. United States*, 267 U.S. 12, 16 (1925).

No statute or regulation, however, limits Petitioner's right to require performance (or the amount of damages it is entitled to recover) in this case. The parties' contract did not contain any clauses limiting recovery. Nor was the contract subject to Federal procurement regulations (or any other mandatory statute or regulation) requiring the inclusion of a contract clause limiting recovery. In the absence of any contract clause expressly restricting the government's liability

for breach of contract, a party who has performed its obligations with respect to the contract is entitled to recover foreseeable and direct damages, including lost or anticipated profits. *See, e.g., Peck Iron & Metal Co., Inc. v. United States*, 603 F.2d 171, 173 (Ct. Cl. 1979).[6]

Nor does the contract otherwise limit the Government's liability for common law damages. Parties to a government procurement contract typically agree to limit their recovery to an equitable adjustment. *See Nolan Bros., Inc.v. United States*, 405 F.2d 1250, 1254 (Ct. Cl. 1969)(by agreeing to the inclusion of a contract clause providing for an equitable adjustment, "[t]he contractor acquiesces in the substitution of a contractual rule under which profit is allowed only on the work actually done."). In this case, however, Petitioner never agreed to limit its recovery in the event of a breach by the Government to an equitable adjustment. Rather, Petitioner entered into an agreement with the Government believing that the Government would either fulfill the terms of its contract or face liability under the general law of contracts: "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much ... if the repudiator had been a State or municipality or a citizen." *The Sinking-Fund Cases*, 99 U.S. 700, 719 (1878).

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[6] Left unchallenged, the Federal Circuit's ruling is tantamount to reading a Changes Clause into every government contract. This application is contrary to law because the so-called Christian Doctrine applies only to procurement contracts in which such a contract clause is required to be included by statute or regulation. *E.g., General Eng'g & Mach. Works*, 991 F.2d at 779-80.

Absent any basis in law, regulation, or the contract itself for limiting Petitioner's recovery, the Federal Circuit's decision can only be explained as an attempt to create a "shadow sovereign immunity" in an attempt to limit the Government's liability for breach of contract damages. Such an anomalous decision should not escape this Court's review.

CONCLUSION

For the reasons stated above, the Washington Legal Foundation respectfully requests the Court to grant the Petition for Certiorari of Petitioner, Wells Fargo Bank, N.A.

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